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IN THE

# Supreme Court of the United States

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DARIUS MORGAN,

*Petitioner,*

v.

FLOYD BENNETT, Superintendent of
Elmira Correctional Facility

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On Petition For Writ Of Certiorari To The
United States Court Of Appeals
For The Second Circuit

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## PETITION FOR WRIT OF CERTIORARI

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56 pp

## Question Presented

Whether the Sixth Amendment Right to Assistance of Counsel is violated by a court order forbidding defense counsel from communicating with the defendant concerning the forthcoming testimony of the prosecution's key witness.

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| QUESTION PRESENTED | (i) |
| TABLE OF AUTHORITIES | (v) |
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| CONSTITUTIONAL PROVISION INVOLVED | 2 |
| STATEMENT OF THE CASE | 2 |
| A. Background | 2 |
| B. Proceedings in State Court | 3 |
| 1. Issues Surrounding Eyewitness' Testimony | 3 |
| 2. The Trial Court's Gag Order | 4 |
| 3. The Decision of the Supreme Court of New York, Appellate Division | 6 |
| C. Proceedings in Federal Court | 7 |
| 1. The Decision of the Eastern District of New York | 7 |
| 2. The Decision of the United States Court of Appeals for the Second Circuit | 7 |
| REASONS FOR GRANTING THE WRIT | 9 |
| I. THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE RELEVANT DECISIONS OF THIS COURT | 9 |

Page

A. The Second Circuit's Rule Deprives the Defendant of His Sixth Amendment Right of Unrestricted Access to Counsel. . . . . 10

1. Depriving a Defendant of His Constitutional Right Creates a Substantial Risk of Prejudice. . . . . 13

B. The Second Circuit's Rule Does Not Conform to This Court's Sixth Amendment Jurisprudence. . . . . 15

1. When Confronted with a Potential Conflict Between the Defendant's Constitutional Rights and Important Governmental Interests the Trial Court Should First Seek to Harmonize the Right and the Interest. . . . . 16

2. Irreconcilable Conflicts Between an Important Governmental Interest and the Constitution Must Be Resolved in Favor of the Constitution. . . . . 20

II. THE DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT IS IN CONFLICT WITH THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS. . . . . 21

A. The District of Columbia Circuit . . . . . 22

B. The Third Circuit . . . . . 25

C. The Fourth Circuit . . . . . 26

D. The Sixth Circuit . . . . . 27

E. The Seventh Circuit . . . . . 27

F. The Ninth Circuit . . . . . 28

Page

G. The Eleventh Circuit . . . . . 29

CONCLUSION . . . . . 30

TABLE OF AUTHORITIES


| *Cases* | Page |
|---|---|
| Bailey v. Redman, 657 F.2d 21 (3rd Cir.), *cert. denied*, 454 U.S. 1153 (1982) | 25, 26 |
| *Board of Regents of the Univ. of Wis. Sys. v. Southworth*, 120 S. Ct. 1346 (2000) | 8 |
| *Bourjaily v. United States*, 483 U.S. 171 (1987) | 17 |
| *Crutchfield v. Wainwright*, 803 F.2d 1103 (11th Cir. 1986), *cert. denied*, 483 U.S. 1008 (1987) | 29 |
| *Geders v. United States*, 425 U.S. 80 (1976) | 7, 8, 9, 10, 11, 12, 13, 15, 17, 18, 20, 22, 23, 25, 26, 27, 28, 30 |
| *Glasser v. United States*, 315 U.S. 60 (1942) | 13 |
| *Hanlon v. Berger*, 526 U.S. 808 (1999) | 8 |
| *Holtzman v. Hellebrand*, 460 N.Y.S.2d 591 (App. Div. 1983) | 4, 27 |
| *Illinois v. Allen*, 397 U.S. 337 (1970) | 16, 20 |
| *Maryland v. Craig*, 497 U.S. 836 (1990) | 15, 17, 20 |
| *McMann v. Richardson*, 397 U.S. 759 (1970) | 16 |
| *Morgan v. Bennett*, 204 F.3d 360 (2d Cir. 2000) | 1, 8, 9, 18, 19 |
| *Morgan v. Bennett*, No. CV-96-4106, 1998 WL 315135 (E.D.N.Y. May 27, 1998) | 2, 14 |
| *Morris v. Slappy*, 461 U.S. 1 (1983) | 18 |
| *Mudd v. United States*, 798 F.2d 1509 (D.C. Cir. 1986) | 13, 22, 24, 26 |
| *People v. Morgan*, 574 N.Y.S.2d 592 (App. Div. 1991) | 2, 6, 7, 29 |
| *People v. Morgan*, 588 N.E.2d 768 (1992) | 2, 7, 29 |
| *Perry v. Leeke*, 488 U.S. 272 (1989) | 7, 8, 11, 12, 13, 21, 26, 27, 28, 29, 30 |
| *Powell v. Alabama*, 287 U.S. 45 (1932) | 10 |

Page

*Rock v. Arkansas*, 483 U.S. 44 (1987) ..... 16, 20
*Roviaro v. United States*, 353 U.S. 53 (1957) ... 23, 24

*Sanders v. Lane*, 861 F.2d 1033 (7th Cir. 1988) .. 27
*Strickland v. Washington*, 466 U.S. 668 (1984) .. 7, 12, 13, 16

*Taylor v. Illinois*, 484 U.S. 400 (1988) ..... 20

*United States v. Bryant*, 545 F.2d 1035 (6th Cir. 1976) ..... 27
*United States v. Cobb*, 905 F.2d 784 (4th Cir. 1990), *cert. denied*, 488 U.S. 1049 (1991) .... 26, 27
*United States v. Cronic*, 466 U.S. 648 (1984) .... 13
*United States v. Eniola*, 893 F.2d 383 (D.C. Cir. 1990) ..... 23, 24, 25
*United States v. Felipe*, 148 F.3d 101 (2d Cir. 1998), *cert. denied*, 525 U.S.909, and *cert. denied*, 525 U.S. 1059 (1989) ..... 19
*United States v. Miguel*, 111 F.3d 666 (9th Cir. 1997) ..... 28
*United States v. Santos*, 201 F.3d 953 (7th Cir. 2000) ..... 28

*Statutes & Rules*

28 U.S.C. §§ 1254(1), 2101(c) ..... 2
28 U.S.C. § 2254 ..... 7
S. Rep. No. 97-532, at 10 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2515, 2516 ..... 9

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## PETITION FOR WRIT OF CERTIORARI

Darius Morgan respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 204 F.3d 360 (2d Cir. 2000) and is set forth in the Appendix at (1a).[1] The

[1] Citations to pages of the Appendix are designated by the abbreviation "(_a)." Citations to the trial transcript are designated by the abbreviation "Tr."

opinion of the Eastern District of New York is reported at No. CV-96-4106, 1998 WL 315135 (E.D.N.Y. May 27, 1998) and is set forth in the Appendix at (23a). The order of the New York Court of Appeals denying leave to Appeal is reported as *People v. Morgan*, 588 N.E.2d 768 (1992) and is set forth in the Appendix at (45a). The opinion of the Supreme Court of New York, Appellate Division, Second Department is reported as *People v. Morgan*, 574 N.Y.S.2d 592 (App. Div. 1991) and is set forth in the Appendix at (46a).

## JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on February 28, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1), 2101(c).

## CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment of the United States Constitution reads as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

## STATEMENT OF THE CASE

### A. Background

On June 7, 1989, Petitioner Darius Morgan was convicted of murder in the second degree and attempted murder in the second degree. (Tr. 786). The conviction

arose out of an incident that occurred during the early morning hours of Friday, February 28, 1987. During that incident Denise Hill was shot and wounded and Rachel Layne was shot and died shortly thereafter. (Tr. 65-66, 679).

The police did not recover any weapons and the bullets they found in the apartment could not be compared to each other, making it impossible to determine whether they were fired from one or more guns. (Tr. 652, 711). There was no circumstantial evidence connecting Mr. Morgan to the crime. The only incriminating evidence against Mr. Morgan came from the eyewitness testimony of Denise Hill.

Ms. Hill, who had been smoking free-based crack cocaine "over and over again" continuously for the six hours before the shooting, told police at her initial interview that two males entered the apartment in a drug-related robbery attempt and began shooting. (Tr. 383, 420, 569). After meeting with Ms. Layne's mother and sister, Ms. Hill told detectives that her boyfriend, Mr. Morgan, had shot both her and Ms. Layne because he was upset at the fact that he could not find his car. (Tr. 364-71).

### B. Proceedings in State Court

#### 1. Issues Surrounding Eyewitness' Testimony.

At the time that Mr. Morgan's trial began, in May 1989, the eyewitness, Ms. Hill, was incarcerated in New Jersey on convictions for armed robbery and burglary. (Tr. 451, 454). She was temporarily moved from New Jersey to Riker's Island in New York to testify at Mr. Morgan's trial. *See Morgan*, 1998 WL 315135, at *2. During the course of the trial, Ms. Hill and Mr. Morgan met and spoke with each other in the pens and on the bus between Riker's Island and the court house. Ms. Hill also wrote Mr. Morgan a love letter during this time. *See id.*

Shortly before Ms. Hill was to be brought into the courtroom on the day she was called to testify, May 30, 1989, she refused to take the witness stand, invoking her privilege against self-incrimination under the Fifth Amendment. (Tr. 230-31). During a chambers conference, outside of the presence of Mr. Morgan and the jury, the prosecutor told the court and defense counsel, for the first time, that Ms. Hill had allegedly been approached by associates of Mr. Morgan while in prison and that she was afraid to testify against Mr. Morgan because she feared for her safety and the safety of her family. (Tr. 233).

The prosecutor then requested an adjournment so that she could prepare an application for a "*Sirois* hearing," which would determine whether a witness' unwillingness to testify was caused by the defendant's misconduct, in which case "the defendant will be deemed to have waived any objection to the admissibility of the witness' prior Grand Jury testimony and said testimony may be admitted as direct evidence at the defendant's trial." *Holtzman v. Hellebrand*, 460 N.Y.S.2d 591, 597 (App. Div. 1983) (per curiam); (Tr. 237-38). The court then ordered an adjournment.

**2. The Trial Court's Gag Order.**

The following day, May 31, 1989, the court granted the prosecution's motion for a *Sirois* hearing. (Tr. 268). Before the hearing began, however, the prosecutor informed the court that during her most recent conversation with Ms. Hill, which occurred earlier that day, Ms. Hill indicated that she "was still afraid to testify but that she would take the stand and testify." (Tr. 280). In spite of this statement, the court concluded that there were no guarantees that Ms. Hill would testify and, consequently, decided to proceed with the *Sirois* hearing on the condition that, if Ms. Hill did agree to testify the next morning, the hearing would not be completed and would be vacated from the record. (Tr. 281-82).

The court then directed defense counsel, Mr.

Avanzino, as follows:

THE COURT: I am going to make this direction to you, Mr. Avanzino. I am going to direct that this portion of the conversation —

MR. AVANZINO: What?

THE COURT: Of the possibility that Miss Hill may testify in this case not be discussed with the defendant.

MR. AVANZINO: Your Honor, I am — naturally will follow the direction of the Court. One of the reasons that I requested that he be present at each and every stage of the proceeding was I could foresee something like that happening. Judge, it's not for me, Judge, to withhold this information from him.

THE COURT: I am directing that —

MR. AVANZINO: If your Honor is directing me, of course I am directed but I don't think it's proper, Judge.

THE COURT: Counselor, these are legal matters. They are not factual matters as to the trial proper itself where the defendant must be present. These are legal matters that the Court has discussed with counsel in chambers outside the presence of the defendant.

MR. AVANZINO: Your Honor, I must be fair and honest with the court.

THE COURT: You have an exception.

MR. AVANZINO: I don't know any way to be. He has already asked me what's gone on in chambers after I have related to him as fully as I can everything that's gone on and it may be a mistaken notion that he has the right to know and I have told him that. (Tr. 282-83).

The court then proceeded with the *Sirois* hearing. The sole witness at that hearing was Detective Catherine Latawiek who had spoken with Ms. Hill several times, most recently that same morning. (Tr. 292). No other witnesses testified at the *Sirois* hearing and the court did not issue a ruling because Ms. Hill, as expected, testified the next morning, June 1, 1989. (Tr. 330).

Before Ms. Hill took the stand, the court appointed an attorney, Mr. Kranz, to represent her in light of Ms. Hill's desire to invoke the Fifth Amendment. Once it was clear that this attorney would be ready to intervene during examination to protect her, Ms. Hill proceeded to testify. (Tr. 242).

Ms. Hill implicated Mr. Morgan. Ultimately, the jury convicted Mr. Morgan of murder in the second degree and attempted murder in the second degree. (Tr. 785-89). He was sentenced to twenty-five years to life for the murder and ten to twenty years for the attempted murder.

### 3. The Decision of the Supreme Court of New York, Appellate Division.

On appeal to the Appellate Division of the Supreme Court of New York, Mr. Morgan raised, *inter alia*, the claim that the gag order of the trial court, which prevented his attorney from telling him of Ms. Hill's decision to testify, violated his right of access to counsel guaranteed by the Sixth Amendment. The Appellate Division rejected this claim and affirmed the conviction on the grounds that a limited restriction on a defendant's access to his attorney does not violate the Sixth Amendment. Since the gag order "did not prohibit all conversations between the defendant and his attorney," *Morgan*, 574 N.Y.S.2d at 593, the Appellate Division did not find any error of law requiring reversal.

Mr. Morgan sought leave to appeal the Appellate Division's decision to the New York Court of Appeals but

was denied. *See Morgan*, 588 N.E.2d at 768.

### C. Proceedings in Federal Court

#### 1. The Decision of the Eastern District of New York.

On August 20, 1996, Mr. Morgan filed a motion under 28 U.S.C. § 2254 to vacate, set aside, or correct his sentence in the United States District Court for the Eastern District of New York. *See Morgan*, 1998 WL 315135, at *1.

The District Court denied the access to counsel claim on the merits. Although the court recognized that a complete ban on counsel-defendant communications for a lengthy period would have been unconstitutional, it noted that the

> prohibition in this case did not prevent defendant from conferring with his counsel "altogether." *Perry v. Leeke*, 488 U.S. 272, 280 (1989) (*citing Strickland v. Washington*, 466 U.S. 668, 692 (1984)). Indeed it did not preclude petitioner from seeking any advice or guidance from his lawyer, and his lawyer was free to discuss anything relating to the trial except the fact that Denise Hill was again likely to testify. This restriction was justified by the prior threats against Denise Hill.

*Morgan*, 1998 WL 315135, at *6.

#### 2. The Decision of the United States Court of Appeals for the Second Circuit.

The Second Circuit affirmed the District Court's decision on the access to counsel claim.

After reviewing the governing law defining a defendant's constitutional right of access to counsel as stated by this Court in *Geders v. United States*, 425 U.S. 80

(1976) and *Perry v. Leeke*, 488 U.S. 272 (1989), the Second Circuit laid down a rule which makes it permissible for a trial court to deprive a criminal defendant of his Sixth Amendment right of access to counsel in order to meet a countervailing governmental interest:

> [T]he court should not, absent an important need to protect a countervailing interest, restrict the defendant's ability to consult with his attorney, but . . . when such a need is present and is difficult to fulfill in other ways, a carefully tailored, limited restriction on the defendant's right to consult counsel is permissible.

*Morgan*, 204 F.3d at 367.

Applying the principles set forth in this rule, the Second Circuit held that the trial court's interest in maintaining witness safety was essential to protecting the integrity of the judicial process and, accordingly, ruled that the gag order placed between Mr. Morgan and his attorney was not an unreasonable application of this Court's decisions in *Geders* and *Perry*. *See Morgan*, 204 F.3d at 368.[2]

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[2] The Second Circuit vacated and remanded for further proceedings the District Court's denial of a separate claim on procedural grounds. Those proceedings are currently in progress before Chief Judge Edward R. Korman of the Eastern District of New York.

In accordance with Supreme Court Rule 13, the Petitioner is submitting this Petition for a Writ of Certiorari within 90 days after entry of the Second Circuit's decision affirming the denial by the District Court of the claim discussed herein. The Second Circuit's denial of this claim is a final judgment appropriate for certiorari review by this Court. This Court has granted certiorari to review a final judgment as to one part of a case in spite of the fact that the court of appeals remanded another part of the same case for further proceedings before the district court. *See e.g., Board of Regents of the Univ. of Wis. Sys. v. Southworth*, 120 S. Ct. 1346 (2000); *Hanlon v. Berger*, 526 U.S. 808 (1999).

## REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Second Circuit has decided an important federal question in a way that conflicts with the relevant decisions of this Court, and has entered a decision in conflict with the decisions of other United States Courts of Appeals on the same important matter.

### I. THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE RELEVANT DECISIONS OF THIS COURT.

The Second Circuit's decision conflicts with the relevant decisions of this Court in two ways. First, it permits defendants, like Mr. Morgan, to be deprived of their Sixth Amendment right to have unrestricted access to counsel for advice on trial-related matters. Second, the Second Circuit has adopted a balancing test which does not conform to the jurisprudential guidelines set forth by this Court.

Trial courts have broad discretion to control the progress and the shape of the trial. *See Geders*, 425 U.S. at 87. Certainly, the trial court's concern for maintaining the integrity of the judicial process includes a need to ensure witness safety. *See Morgan*, 204 F.3d at 368; S. Rep. No. 97-532, at 10 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2515, 2516. ("Without the cooperation of victims and witnesses, the criminal justice system would simply cease to function and few criminals, if any, would be brought to justice."). We do not criticize the Second Circuit for respecting that important need.

However, the balancing test set forth by the Second Circuit does not constitute an appropriate method for reconciling the defendant's constitutional right of unrestricted access to counsel with an important coun-

tervailing interest, such as the need to protect a witness. Instead of presenting the question as a choice between either allowing the defendant to communicate with his attorney, or taking a risk that a witness might be harmed, both the trial court and the Second Circuit should have recognized that these interests must be harmonized, not placed in opposition to each other, in order to achieve the aim of protecting the integrity of the judicial process. Consequently, the Second Circuit's balancing test is at odds with both the constitutional guarantees of the Sixth Amendment, and the guidelines set forth by this Court for resolving conflicts like the one presented here. This rule is, therefore, novel; it allows trial courts to deprive a defendant of a constitutionally guaranteed right in order to meet a countervailing interest, which, though important, is not of a constitutional dimension. Whether or not the limits of the trial court's discretion may be so extended is a serious question which calls for this Court's guidance.

### A. The Second Circuit's Rule Deprives the Defendant of His Sixth Amendment Right of Unrestricted Access to Counsel.

This Court's decisions in *Geders v. United States*[3] and

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[3] The gag order in *Geders* barred all communication between a defendant and his attorney during a seventeen-hour overnight recess taken while the defendant was testifying. *See Geders*, 425 U.S. at 82. The Court acknowledged that the trial court had broad powers to sequester witnesses during recesses with one exception: the defendant. Although the Court was sympathetic to the trial court's objective, preserving the truth-seeking function of the trial by preventing witness coaching, it found that the Sixth Amendment mandated that the defendant be allowed to communicate with his attorney because, as a party to the proceeding, the adversary system requires that he have "the guiding hand of counsel at *every step* in the proceedings" in order to ensure a fair trial. *Id.* at 89 (quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)) (emphasis added). The Court ruled that an attorney must be able to communicate freely with his client during an overnight recess because he may, for

*Perry v. Leeke*[4] have unequivocally established that it is "the defendant's right to *unrestricted* access to his lawyer for advice on a variety of trial-related matters that is controlling in the context of a long recess." *Perry*, 488 U.S. at 284. The Sixth Amendment, therefore, guarantees the defendant the right to discuss with his

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instance, "need to obtain from his client information made relevant by the day's testimony." *Id.* "*At the very least*," unfettered communication is essential because it "gives the defendant a chance to discuss with counsel the significance of the day's events." *Id.* (emphasis added). Deprivation of counsel in this context was so serious an error that it constituted a *per se* violation of the Sixth Amendment. *See Perry*, 488 U.S. at 278-79 ("There is merit in petitioner's argument that a showing of prejudice is not an essential component of a violation of the rule announced in *Geders*.").

[4] *Perry* addressed an issue left open in *Geders*: the defendant's right of access to counsel during a short recess. *Perry* involved an order of the trial court which prohibited the defendant from talking to anyone, including his lawyer, during a fifteen minute recess taken during his testimony. *See Perry*, 488 U.S. at 274. As in *Geders*, the *Perry* gag order was issued to prevent the defendant from being improperly coached while on the witness stand.

In contrast to *Geders*, this Court upheld the gag order in *Perry* relying on the key distinction that "it is appropriate to presume that *nothing but the testimony*" would have been discussed between the defendant and his attorney during the short recess. *Id.* at 283-84 (emphasis added). In light of the fact that the defendant did not have a right to be coached by his attorney while on the witness stand, *id.* at 284, this Court held that a gag order which essentially barred communication on that matter alone did not deprive the defendant of his Sixth Amendment rights.

*Perry*, however, reaffirmed the holding of *Geders* as it pertained to long recesses where normal consultation between the defendant and his lawyer "would encompass matters that go beyond the content of the defendant's own testimony – *matters that the defendant does have a constitutional right to discuss with his lawyer, such as the availability of other witnesses*, trial tactics, or even the possibility of negotiating a plea bargain." *Id.* (emphasis added). Once the Constitution has thus been implicated, *Perry* emphasized that the law as stated by this Court in *Geders* is clear: "It is the defendant's right to *unrestricted access* to his lawyer for advice on a variety of trial-related matters that is controlling in the context of a long recess." *Id.* (citing *Geders*, 425 U.S. at 88) (emphasis added).

attorney trial-related matters, which include "the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain." *Id.* Counsel, on his part, has an "overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." *Strickland*, 466 U.S. at 688. A trial court, therefore, deprives the defendant of his right to the assistance of counsel, in violation of the Sixth Amendment, when it prohibits communication between him and his lawyer on matters to which the defendant is entitled to advice. *See Perry*, 488 U.S. at 284; *Geders*, 425 U.S. at 88-89.

The trial court here issued an overnight gag order which prohibited defense counsel from informing Mr. Morgan that the only eyewitness against him was going to testify the following day. This restriction applied, not to logistical matters, such as where he and his counsel could confer, or for how long, but rather to the *subject matter* of their discussion. The gag order not only barred Mr. Morgan and his lawyer from discussing the eyewitness' availability; it, in fact, precluded any consultation on, or even a simple review of, the trial strategy they would employ during her cross-examination.

Neither the Second Circuit nor any of the other courts reviewing these facts has asserted that Mr. Morgan did not have a right, protected by the Sixth Amendment to the Constitution, to discuss these matters with his attorney. It is certain that he did. *See Perry*, 488 U.S. at 284 (stating that a defendant is constitutionally entitled to discuss with counsel the availability of witnesses and trial tactics). What the Second Circuit held, however, is that, while Mr. Morgan *had* a right, guaranteed by the Sixth and Fourteenth Amendments, 1) to learn from his lawyer that the only eyewitness in his case was going to testify and 2) to review the defense's trial strategy relating to that witness, nonethe-

less, *the trial court had the discretion to deprive him of that right.* Although the decision holds that trial courts can only exercise such discretion when confronted with an important need to protect a countervailing interest, and must carefully tailor their restriction, there is no question that this rule allows trial courts to deprive the defendant of the assistance of counsel.

### 1. Depriving a Defendant of His Constitutional Right Creates a Substantial Risk of Prejudice.

As this Court has noted on several occasions, government can not deprive the defendant of the assistance of counsel without introducing an unacceptable risk of prejudice into the proceedings. For this reason, this Court has held that deprivations of counsel constitute prejudice *per se*. *See Strickland*, 466 U.S. at 692; *United States v. Cronic*, 466 U.S. 648, 659 n.25 (1984) ("The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding."); *Perry*, 488 U.S. at 279; *Geders*, 425 U.S. at 80; *Glasser v. United States*, 315 U.S. 60, 76 (1942) ("The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.").[5]

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[5] As stated by the District of Columbia Circuit the rationale behind this *per se* rule is that:

> To require a showing of prejudice would not only burden one of the fundamental rights enjoyed by the accused, but also would create an unacceptable risk of infringing on the attorney-client privilege. The only way that a defendant could show prejudice would be to present evidence of what he and counsel discussed, what they were prevented from discussing, and how the order altered the preparation of his defense. Presumably the government would then be free to question defendant and counsel about the discussion that did take place, to see if defendant nevertheless received adequate assistance.

*Mudd v. United States*, 798 F.2d 1509, 1513 (D.C. Cir. 1986)

Although a prejudice analysis is unnecessary, an examination of the record in Mr. Morgan's case provides a useful illustration of how damaging the deprivation of a defendant's Sixth Amendment rights can be to the reliability of the trial. Both the Second Circuit and the District Court believed that the gag order did not substantively harm Mr. Morgan because the defense had already been prepared to cross-examine the eyewitness when she was first called to testify. This reasoning presumes that, since the defense had been prepared when the witness was first called, defense counsel already "had ample opportunity to consult with petitioner [Mr. Morgan] in preparation for [the witness'] testimony." *See Morgan*, 1998 WL 315135, at *6. Implicit in this analysis is the assumption that the cross-examination the defense was prepared to make when the eyewitness was first called, on May 30, 1989, was substantially identical to the cross-examination that actually took place two days later, on June 1, 1989. This proposition, if it could be shown, would seem to demonstrate that the gag order did not affect the defense's efforts to prepare its case.

This reasoning is flawed. Even if the proposition could somehow be established, it proves nothing. Of course, since the defense was precluded from reviewing its strategy, defense counsel most likely cross-examined the eyewitness in the manner that he would have on May 30, 1989. The question that would determine the issue of prejudice, however, is whether the defense strategy for cross-examining the eyewitness would have been *different* in the absence of the gag order. The fact that the defense had previously prepared a cross-examination for Ms. Hill, therefore, is totally irrelevant.

Thus, a finding of prejudice would require a showing that the defense would have asked the eyewitness different questions than it did, had there been no gag order. It is impossible to make such a determination.

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(citations omitted).

There is no record which indicates what the defense strategy would have been in the absence of the gag order. Any attempt to compare the eyewitness' actual cross-examination on June 1, 1989 with a hypothetical cross-examination would be nothing more than an exercise in fantasy. Nor is there any way to determine how Mr. Morgan and his attorney would have adjusted their strategy in light of the eyewitness' allegations of threats and her prior refusal to testify – facts which were available to the defense only *after* it had been prepared to cross-examine the eyewitness on May 30, 1989.

As shown here, the trial court's attempt to apply a limited restriction on Mr. Morgan's access to counsel resulted in a violation of his Sixth Amendment rights. By expressly permitting trial courts to impose such gag orders between defense counsel and the defendant, the Second Circuit's rule violates the Sixth Amendment.

### B. The Second Circuit's Rule Does Not Conform to This Court's Sixth Amendment Jurisprudence.

When confronted with a potential conflict between the defendant's constitutional rights and important interests of trial administration, a trial court should "harmonize" the two in a way that best preserves the "essence" of both interests. *Maryland v. Craig*, 497 U.S. 836, 849, 857 (1990). To the extent that both the right and the interest can be harmonized, this Court has found alternatives that restrict, *but do not deprive*, the defendant of his constitutional rights, while accommodating the important countervailing interest involved. If the interest, however, cannot be protected without depriving the defendant of his constitutional right, the conflict between the two must be resolved in favor of the Constitution. *See Geders*, 425 U.S. at 91.

The Second Circuit's balancing test is not a legitimate rule which was simply misapplied in this case. It is a defective rule. It departs from this Court's guidelines on

how a conflict between fundamental constitutional rights and important governmental interests should be resolved. It should be reviewed by this Court.

### 1. When Confronted with a Potential Conflict Between the Defendant's Constitutional Rights and Important Governmental Interests the Trial Court Should First Seek to Harmonize the Right and the Interest.

It is well-established that trial courts have broad powers to control the progress and the shape of the trial. *See id.* at 86-87. Trial courts, for example, have the power to remove an unruly defendant from the courtroom to ensure the orderly conduct of the proceedings, *see Illinois v. Allen*, 397 U.S. 337 (1970); they may, moreover, regulate the admissibility of evidence to ensure the accuracy of the trial process. *See Rock v. Arkansas*, 483 U.S. 44 (1987). Among a trial court's duties, in this regard, is the supervision of the proper functioning of the adversarial system.

Fairness requires that evidence be subject to adversarial testing. *See Strickland*, 466 U.S. at 685. Furthermore, the adversarial system depends upon the Sixth Amendment to function properly. It is for this purpose that the Sixth Amendment guarantees all criminal defendants the right to the effective assistance of competent counsel. *See McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970); *see also Strickland*, 466 U.S. at 685 ("The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the ample opportunity to meet the case of the prosecution to which they are entitled.").

Given therefore that both the constitutional rights of the criminal defendant and the interests of trial administration have the same purpose of ensuring the fairness

and truthfulness of the judicial process, this Court has indicated that a trial court's first duty must be to reconcile the two, if at all possible, and to exercise its discretion *"within the limits of the adversary system."* *Geders*, 425 U.S. at 87 (emphasis added).

Thus, in *Bourjaily v. United States*, 483 U.S. 171, 182 (1987), this Court approached the issue of the admissibility of hearsay by a declarant who could not be confronted by the defendant, by taking steps "to *harmonize* the goal of the Confrontation Clause – placing limits on the kind of evidence that may be received against a defendant – with a societal interest in accurate fact-finding, which may require consideration of out-of-court statements." (emphasis added).

The need to "harmonize" opposing interests was again recognized in *Craig*, 497 U.S. at 849. This Court confronted the question of whether the Confrontation Clause guaranteed the accused the right to a "face-to-face courtroom encounter." *Id.* at 843. Upon conducting an analysis of the Confrontation Clause "in a manner sensitive to its purposes and sensitive to the necessities of trial and the adversary process," this Court ruled that face-to-face confrontation with witnesses was not an "indispensable element" of the Sixth Amendment's guarantee of the right to confront one's accusers. *Id.* at 849. Accordingly, an appropriate balance could be struck between this right and the effective administration of the trial. Consequently, the Court held that it was permissible for a trial court to receive by one-way closed circuit television the testimony of an alleged child abuse victim upon determining that the child's courtroom testimony would cause the child to suffer serious emotional distress. *See id.* at 853.

These cases demonstrate that this Court, when confronted with a potential conflict between the defendant's constitutional rights and governmental interests, considers solutions which limit, *but do not remove*, the defendant's rights. The Court prefers this alternative to

the approach advocated by the Second Circuit; an approach which places the competing rights and interests in direct opposition and compels a choice of one over the other.

A trial court may not make "unreasoning and arbitrary" decisions which "violate the right to the assistance of counsel." *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983); *Geders*, 425 U.S. at 87. Any rule which allows a trial court to deprive a defendant of a guaranteed right before considering alternative solutions must, at the very least, be considered unreasoning and arbitrary; the Second Circuit rule allows a trial court to deprive a defendant of a constitutional right without considering alternatives. *See Morgan*, 204 F.3d at 367. It is unreasoning and arbitrary.

In this case, the trial court could have availed itself of clear alternatives which would have protected the witness without depriving the defendant of his Sixth Amendment right. Mr. Morgan and the eyewitness, Ms. Hill, were both in custody. The court could have either 1) issued a protective order regarding Ms. Hill and her family or 2) ordered that Mr. Morgan be prevented from communicating with anyone *but* his attorney during the overnight recess.

A protective order for Ms. Hill and her family would have ensured their safety, while preserving Mr. Morgan's right of access to counsel. Similarly, an order which would have prohibited Mr. Morgan from communicating with anyone but his attorney would have accomplished all of the goals of the gag order issued here, without depriving Mr. Morgan of his rights. Such an order would have been not only entirely appropriate, but also would have yielded a more effective way of ensuring the eyewitness' safety as it could have been policed more reliably than the order issued in this case. This order could not be policed at all.

An order which prohibits a defendant from communicating with anyone but his attorney is not unprece-

dented. *United States v. Felipe*, 148 F.3d 101 (2d Cir.), *cert. denied*, 525 U.S. 909, and *cert. denied*, 525 U.S. 1059 (1989), for example, dealt with a prisoner who was found to have ordered several violent crimes from his jail cell. Faced with convincing evidence that the prisoner was likely to order more crimes from prison, the Second Circuit approved an order prohibiting him from "corresponding with, and receiving visits from, anyone except his attorney and close family members approved by the district court with notice to the U.S. Attorney's office, and that correspondence and visits with everyone except his attorney be monitored." *Id.* at 107.[6] It is noteworthy that even in this extreme example, which did not involve a defendant in the midst of his trial, the law has gone to great lengths to prevent the government from acquiring the power to define the scope of the attorney's relationship to his client. The attorney, in fact, was the only person who did not require the approval of the district court to meet with the prisoner and was the only one who could communicate with him in private. *Id.*

The trial court in this case issued its gag order *sua sponte* immediately upon learning that the eyewitness was going to testify.[7] The trial court did not review any

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[6] Such restrictions were justified "upon a showing of probable cause." *Id.* at 109 (citing 18 U.S.C. § 3582(d), which allows district courts to limit the associational rights of defendants convicted of racketeering offenses).

[7] The trial court issued the order on the basis of statements made by the prosecution. Although the court began a *Sirois* hearing to determine whether or not Mr. Morgan had actually threatened the witness, that hearing was adjourned without any findings of fact. The Second Circuit stated that there was not "any impairment of the ability of Morgan – who was present at the *Sirois* hearing – to defend against the allegations that he and his associates had engaged in intimidation attempts." *Morgan*, 204 F.3d at 368. This is incorrect, however, because the *Sirois* hearing was adjourned during the presentation of the government's case and *before* the defense had the opportunity to present any evidence in response to the allegations of witness tampering.

alternatives before issuing the order, even though at least two alternatives which would have protected the witness, without depriving the defendant of his constitutional right of access to counsel, were available.

When confronted with what seemed to be a potential conflict between the defendant's right of access to his counsel and the need to prevent witness intimidation, the trial court should have considered alternatives to harmonize the two goals – before simply subordinating one to the other. By giving trial courts a mandate to make that choice without requiring a review of alternative measures, the Second Circuit's rule allows for "arbitrary and disproportionate" deprivations of counsel such as occurred in this case. *See Rock*, 483 U.S. at 45.

### 2. Irreconcilable Conflicts Between an Important Governmental Interest and the Constitution Must be Resolved in Favor of the Constitution.

If, upon a review of alternatives, a trial court finds that a conflict between the defendant's rights and the interests of trial administration can not be resolved, "the conflict must, under the Sixth Amendment, be resolved in favor of the right to the assistance and guidance of counsel." *Geders*, 425 U.S. at 91; *see generally Craig*, 497 U.S. at 860-70 (Scalia, J. dissenting) ("We are not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees, and then to adjust their meaning to comport with our findings.").[8]

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[8] *Illinois v. Allen*, 397 U.S. 337 (1970) and *Taylor v. Illinois*, 484 U.S. 400 (1988) are examples of cases where the Court allowed the defendant to be deprived of a constitutionally guaranteed right: the right to be present at trial in *Allen* and the right to call witnesses in *Taylor*. Those cases, however, did not determine that the defendant was not entitled to those rights but rather than he effectively waived them. The defendant in *Allen* lost his rights by engaging in obstreperous conduct in the courtroom. In *Taylor*, the defendant engaged in a pattern of discovery violations that seemed to be

In spite of the existence of the alternatives discussed above, to the extent that the trial court may have found itself in a position where it felt compelled to choose between either allowing the defendant to enjoy his right to counsel or accommodating the interests of the trial, the law is clear. The Constitution must prevail.

The Second Circuit's rule, which allows trial courts to deprive a criminal defendant of the assistance of counsel, does not enhance, but inhibits, the truth-seeking function of the trial. Both the constitutional rights of the defendant and important trial-administration concerns have the purpose of enhancing the integrity of the judicial process. Thus, when the Second Circuit sets the right and the interest in opposition it presents a paradox. As such, the Second Circuit's rule defeats, rather than advances, the Court's goal of maintaining the integrity of the judicial process. It is unconstitutional and should be reviewed by this Court.

## II. THE DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT IS IN CONFLICT WITH THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS.

Every Court of Appeals to examine the issues raised here is sharply divided with the Second Circuit. To the extent that any circuit has faced a conflict between the defendant's constitutional rights and important government interests, it has harmonized the two without violating *Perry*'s rule of unrestricted access to counsel during a long recess. No circuit has made it permissible for a trial court to deprive a defendant of this fundamen-

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designed to conceal a plan to present fabricated testimony. Exclusion of the tainted evidence was therefore appropriate and did not violate the Sixth Amendment's Compulsory Process Clause. There is no authority supporting the view that a sufficiently compelling trial interest can justify the deprivation, as opposed to a mere restriction, of a constitutional right.

tal right.

### A. The District of Columbia Circuit

In *Mudd v. United States*, 798 F.2d 1509 (D.C. Cir. 1986), the District of Columbia Circuit held that an order instructing defense counsel not to speak with his client about the latter's testimony over a weekend recess deprived the defendant of his Sixth Amendment right to the effective assistance of counsel. *Mudd* involved a limited gag order, similar to the one imposed on Mr. Morgan, which prevented trial counsel from talking to the defendant about his testimony, but allowed them to talk "about other things." *Id.* at 1510.

On appeal, the District of Columbia Circuit relied upon *Geders* to hold that the gag order violated the defendant's right to counsel and reversed the conviction. The court viewed *Geders* as grounded in the understanding that restraints on *any* of the matters trial counsel and defendant are entitled to discuss violates the Sixth Amendment – regardless of whether or not the order is a blanket prohibition. *See id.* at 1511-12.

*Mudd* explained the dangers of a limited order, such as the one involved in Mr. Morgan's case, as follows:

> While the order in this case was indeed more limited than the one in *Geders*, the interference with Sixth Amendment rights was not significantly diminished. Even though Mudd was free to discuss strategy and tactics, there are obvious, legitimate reasons he may have needed to consult with counsel about his upcoming cross-examination. . . . [A]n order such as the one in this case can have a chilling effect on cautious attorneys, who might avoid giving advice on non-testimonial matters for fear of violating the court's directive. Consultation between lawyers and clients cannot be neatly divided into discussions about 'testimony' and those about 'other' matters.

*Id.* at 1512. According to the court, *Geders* made it clear that "courts may not balance the danger of altered testimony against the right to counsel." *Id.*

In *United States v. Eniola*, 893 F.2d 383 (D.C. Cir. 1990), the District of Columbia Circuit confronted a case very similar to this one. *Eniola* involved two co-defendants, Eniola and Bamji, who were on trial for drug-related offences arising out of an undercover police operation. During the trial, it was revealed at two bench conferences that a potential witness was a government informant. The trial court issued a protective order which barred both defense counsel from discussing with their respective clients not only the potential witness' ongoing status as a police informant, but also her past status and role as an informant at the time of the drug transaction. *See id.* at 385.

The government argued that a conflict existed between the right to effective assistance of counsel and the privilege of police informants to shield their identity and that the Sixth Amendment concerns raised should be overridden according to the balancing test found in *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957), which holds that "[w]hether a proper balance renders non-disclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors."

The District of Columbia Circuit rejected this argument, finding that the government's

> reasoning ignores the rationale underlying the Sixth Amendment right to effective assistance of counsel. Unlike the cases offered by the government, which focused on the relevancy of the informant's role and potential testimony, in this case the trial court's protective order did not preclude defendants from calling the witness. . . . Instead, *the protective order im-*

> *pinged directly on defense counsel's ability to confer with the client on a critical aspect of the defense.* As the First Circuit has observed, "utmost candor between an attorney and client is essential to effective assistance of counsel." Therefore, *the Sixth Amendment protects the defendant against intrusions that could inhibit the free exchange of information between attorney and client.* While we recognize that this Sixth Amendment value will not always trump the informant's privilege, where defense counsel has presented an arguable scenario for entrapment, his ability to pursue this course cannot be hemmed in by the privilege. As the *Mudd* court counseled, appellants need not show prejudice to establish a violation of the right to effective assistance of counsel.

*Eniola*, 893 F.2d at 387 (citations omitted) (emphasis added).

The court found that a balancing test such as *Roviaro* can not be applied to this context because the Sixth Amendment "either is or is not implicated." *Id.* at 388. "The essence of the Sixth Amendment threshold is whether defense counsel has demonstrated that the entrapment defense has legitimate potential such that he is entitled freely to discuss strategies with his client for attempting to prove the defense." *Id.*

The Court of Appeals found that one of the defendants, Eniola, could not present an arguable scenario for entrapment. As a result, it refused to find that his right to counsel encompassed discussions relating to the witness who was the subject of the gag order. *See id.* at 387. The court thus was able to reconcile Eniola's Sixth Amendment right to counsel with the government's interest in maintaining the informant's privilege. Although Eniola would normally have had the freedom to discuss any matter with his attorney, his need to receive advice in order to assure him a fair trial did not

encompass a discussion of the informant's testimony. It was therefore appropriate to restrict his access to counsel as he was *not* being deprived of his constitutional right.

With respect to the other defendant, Bamji, the Court of Appeals found that the Sixth Amendment threshold was breached because there was sufficient evidence in the record to present an arguable scenario for entrapment. *See id.* The Sixth Amendment, therefore, required that Bamji should not be inhibited from exploring the same matter with his attorney. His right to counsel, therefore, could *not* be reconciled with the gag order; consequently, the gag order violated his constitutional right to the assistance of counsel.

### B. The Third Circuit

*Bailey v. Redman*, 657 F.2d 21 (3rd Cir.), *cert. denied*, 454 U.S. 1153 (1982), held that an order which prohibited a defendant from discussing his testimony with anyone during an overnight recess, a total of seventeen hours, constituted a *per se* violation of the defendant's Sixth Amendment rights. *See id.* at 23-24. The court, however, noted in its reading of *Geders* that defense counsel "argued vigorously at the time of imposition of the restriction that the trial court's instruction was improper and violated [his] clients' rights to consult with counsel." *Id.* at 24. n.4. Based upon this fact, the court required the defendant to show that he would have met with his counsel before concluding that he had been deprived of his right to consult with his attorney. In the absence of such evidence, the court did not grant relief.

Defense counsel in Mr. Morgan's case clearly objected to the gag order, stating first "Judge, it's not for me, Judge, to withhold this information from him" and later "He has already asked me what's gone on in chambers after I have related to him as fully as I can everything that's gone on and it may be a mistaken notion that he has the right to know and I have told him that." (Tr.

282-83). The distinction between *Bailey* and the Second Circuit's decision is that *Bailey* found that the defendant did not preserve his rights, while the decision below acknowledged that Mr. Morgan preserved his rights yet overrode them.

### C. The Fourth Circuit

The Second Circuit's decision is also in conflict with the decision of the Fourth Circuit Court of Appeals in *United States v. Cobb*, 905 F.2d 784 (4th Cir. 1990), *cert. denied*, 488 U.S. 1049 (1991). *Cobb* involved a gag order issued during a defendant's cross-examination, which prevented the defendant from discussing his ongoing testimony with anyone, including his attorney, during a weekend recess. Applying *Geders*, *Perry*, and *Mudd*, the Fourth Circuit held that this order effectively denied Cobb of access to counsel:

> To remove from Cobb the ability to discuss with his attorney any aspect of his ongoing testimony effectively eviscerated his ability to discuss and plan trial strategy. To hold otherwise would defy reason. How can competent counsel not take into consideration the testimony of his client in deciding how to try the rest of the case?

*Id.* at 791. *Cobb* recognized the concerns of ensuring the veracity of testimony and protecting the integrity of an ongoing cross-examination. However, the court ruled that *Perry* stood for the proposition that these concerns at some point "must give way to the protections of the Sixth Amendment." *See id.* at 792. The court then quoted *Perry*: "It is the defendant's right of unrestricted access to his lawyer for advice on a variety of trial-related matters that is controlling in the context of a long recess." *Id.* (quoting *Perry*, 488 U.S. at 284.) The court also took note of *Mudd*'s reasoning about the chilling effect of even limited gag orders on cautious attorneys. *Id.* at 791.

*Cobb* found that the gag order imposed on the defendant clearly violated his Sixth Amendment right to counsel because it "effectively eviscerated his ability to discuss and plan trial strategy." *Id.* at 792. Although it recognized the importance of the fairness concerns behind the gag order, it adhered to *Perry*'s requirement of *unrestricted access* when Sixth Amendment protections come into play.

### D. The Sixth Circuit

The Second Circuit's decision is also inconsistent with a decision of the Sixth Circuit Court of Appeals. *United States v. Bryant*, 545 F.2d 1035 (6th Cir. 1976) held that *Geders* applied to an hour-long luncheon recess when a party on trial would ordinarily be entitled to consult with his attorney. The Court of Appeals stated that:

> [A] defendant in a criminal trial often needs to consult with his attorney during trial about matters other than his own testimony. He is entitled to the advice of counsel *throughout* the trial. . .

*Id.* at 1036 (emphasis added).

### E. The Seventh Circuit

Similarly, in *Sanders v. Lane*, 861 F.2d 1033 (7th Cir. 1988), the Seventh Circuit Court of Appeals held that any judicial order prohibiting conversations between an accused and his attorney during a trial recess violates the Sixth Amendment. The violation is found in the interference itself, and consequently, the court stated that "the defendant need not demonstrate prejudice." *Id.* at 1039. The gag order at issue in *Sanders* prohibited the defendant from consulting with his attorney during a one-hour lunch break during the course of the defendant's testimony. After the defendant testified, however, the court granted defense counsel a separate recess to discuss the matters he wanted to raise with his client at lunch. The court relied upon the fact that the

court granted a subsequent recess to find that the gag order issued during the lunch recess did not contaminate the proceeding and was harmless.

Most recently, in *United States v. Santos*, 201 F.3d 953 (7th Cir. 2000), the Seventh Circuit ruled that the trial court deprived defendant of her right to counsel when the trial judge forbade the defendant's lawyer from discussing during an overnight recess the substance of his client's testimony, but allowed conversation "regarding strategy, the calling of witnesses, and so on." *Id.* at 956. In the court's view, *Perry* made clear that "while the trial judge may instruct the lawyer not to coach his client," he must not prevent discussions of defendant's ongoing testimony during a substantial recess so as not to preclude assistance of counsel with respect to "legitimate legal and tactical questions." *Id.* The court found that the order deprived the accused of her Sixth Amendment right to effective assistance of counsel, even though the lawyer was free to confer with the defendant and discuss certain aspects of her testimony. *See id.* at 956-66.

### F. The Ninth Circuit

In *United States v. Miguel*, 111 F.3d 666 (9th Cir. 1997), the Ninth Circuit found that the defendant's inability to communicate contemporaneously with his counsel during a videotaped deposition conducted outside the presence of the defendant "raised serious Sixth Amendment problems." *Id.* at 672. However, because the defendant, who was represented by two counsel, could have asked the non-questioning attorney to join him during the deposition, the court found no unlawful restriction on the defendant's access to counsel. *See id.* at 673. The Ninth Circuit explained that *Geders* and *Perry* demanded unrestrained access to counsel with respect to matters which the defendant has a constitutional right to discuss with his lawyer. *See id.* at 672. The court recognized that *Perry* was limited to situations in which the defendant is *not* entitled to

counsel's advice. *See id.* at 672 n.13. ("The result in *Perry* depended, however, on the fact that a defendant is not entitled to confer with counsel during the defendant's testimony.").

### G. The Eleventh Circuit

As with the other six circuits discussed, the Eleventh Circuit's decision in *Crutchfield v. Wainwright*, 803 F.2d 1103 (11th Cir. 1986), *cert. denied*, 483 U.S. 1008 (1987), draws a clear line between restrictions on substantive attorney-client communication on matters related to the trial and restrictions which do not prevent the defense from discussing important trial matters. In *Crutchfield*, the trial judge admonished the defendant not to discuss his testimony with his attorneys during a two hour lunch break while he was on the stand. The Court of Appeals held that *any* deprivation of the assistance of counsel constitutes reversible error which necessitates a new trial. *See id.* at 1108. The court held, however, that a defendant must demonstrate deprivation of counsel by showing that he and his counsel actually desired to confer during the recess. Again, unlike in Mr. Morgan's case, the attorney here did not object to the gag order and, as a result, the court did not find a deprivation of counsel. *See id.* at 1110.

None of these circuits have adopted a rule which would allow the trial court to prohibit the defendant from speaking with his lawyer about a trial-related matter, such as the availability of the prosecution's only eyewitness, during an overnight recess, no matter how important the countervailing interest. The Second Circuit, however, has clearly split itself from its sister circuits by ruling that the constitutional right of access to counsel *can be deprived* in order to advance an important countervailing need. Given the importance of this matter and the need for guidance on such a fundamental issue of trial management, this Court should grant this petition for a writ of certiorari.

## CONCLUSION

The rule adopted by the Second Circuit departs from the decisions of this Court and seven other circuits addressing the issue of how a trial court should respond to a potential conflict between a defendant's constitutional rights and an important governmental interest. This case presents a timely opportunity for this Court to review the Second Circuit's ruling and immediately reinstate the authority of this Court's decisions in *Geders v. United States*, 425 U.S. 88 (1976), and *Perry v. Leeke*, 488 U.S. 272 (1989), in the Second Circuit.

For the foregoing reasons, Darius Morgan respectfully requests that this Court grant a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit.

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